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No. 82-957

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

DOUBLEDAY SPORTS, INC.,
Petitioner,
v.
EASTERN MICROWAVE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF CBS INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE

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January 7, 1983

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MOTION OF CBS INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CBS Inc. ("CBS") respectfully moves the Court for leave to file the attached brief *amicus curiae* supporting the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Counsel for the petitioner has consented to the filing of the attached brief. CBS was unable to obtain consent from counsel for the respondent.

The interest of CBS is set forth at pages 1-3 of the attached brief. In summary, CBS, in addition to being a copyright owner, owns five television stations (including WCBS-TV, whose signal is retransmitted at certain times of day by respondent) and operates the CBS Television Network. The five CBS-owned stations and the CBS network transmit copyrighted television programs and feature films. The court of appeals, departing from the plain language of the Copyright Act, fashioned an exemption from copyright liability for certain nonpassive secondary transmitters of copyrighted television programming. The CBS brief discusses the potential impact of that decision on the competitive position of royalty-paying broadcasters and distributors of television programming. This is an interest that the petitioner (a copyright owner) does not represent or fully discuss. It further demonstrates the importance of the question raised by the petition.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF CBS INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CBS Inc. ("CBS") respectfully submits this brief *amicus curiae* in support of the Petition for a Writ of Certiorari.

INTEREST OF AMICUS CURIAE

CBS owns five television stations (including WCBS-TV, whose signal is retransmitted at certain times of the day by respondent Eastern Microwave, Inc., or "EMI") that broadcast copyrighted television programs and feature films. CBS operates the CBS Television Network, over which it distributes copyrighted television programs

and feature films to the five CBS-owned stations and to some 200 other affiliated stations. And CBS produces copyrighted audiovisual works which it licenses to royalty-paying cable networks that distribute the works to cable systems. CBS pays substantial amounts, either as creator or as licensee, for copyrighted programming for television and cable. Its activities will be directly affected by the holding of the court of appeals that companies like EMI are at liberty to create royalty-free cable networks by appropriating broadcast television signals containing copyrighted works, transporting them via satellite or microwave to areas where they cannot be received off the air, and marketing them for profit in competition with broadcast and cable networks, local broadcasters, and others who pay copyright royalties—all without obtaining any authorization from, or paying any compensation to, the owners of copyright in those works.

Congress made clear when it rewrote the Copyright Act in 1976 that owners of copyrighted television programming are entitled to compensation for the use of their intellectual property. It gave the copyright owner the exclusive right to perform publicly (or authorize the public performance of) his audiovisual work. 17 U.S.C. § 106(4) (1976 & Supp. V 1981). It protected the interest of cable television systems in assuring the continued availability of programming by creating a limited compulsory license under which cable television systems could, by filing a notice and paying royalties, obtain the right to retransmit copyrighted broadcasts. 17 U.S.C. § 111(c) (1976 & Supp. V 1981). And Congress exempted passive carriers like the telephone company, which merely make facilities available for others to use, from copyright liability. 17 U.S.C. § 111(a)(3) (1976 & Supp. V 1981). But Congress did not create any compulsory license or exemption for a nonpassive secondary transmitter like respondent to run a royalty-free, network cable program supply service by actively selecting and marketing broadcast television signals for its own profit.

The court of appeals' decision expanding the telephone company exemption to cover companies like EMI threatens the balance struck by Congress in 1976. The decision limits in a manner not intended by Congress the right of copyright owners to exploit their property. It places royalty-paying distributors and broadcasters of copyrighted television programming at a competitive disadvantage. And the decision opens the door to further erosion of the intellectual property rights that provide the incentive for the creative endeavors on which CBS and the entire television industry depend.

ARGUMENT

A. The Decision Below

The specific question presented to the Court in this case is whether companies like EMI, which select the signals of particular broadcast television stations on the basis of the copyrighted programming they contain, retransmit them without editing, and actively market them to cable system customers, all without either authorization from copyright owners or a statutory license, are exempt from copyright liability as purely passive common carriers. The district court held, first, that EMI's unlicensed retransmissions constitute unauthorized public performances which, unless exempt, violate petitioner's exclusive right under Section 106(4) to perform publicly (or to authorize the public performance of) its copyrighted works. The district court then held that EMI does not qualify for the Section 111(a)(3) "passive carrier" exemption because, in the words of the statute, it exercises "control over the . . . selection of the primary transmission." The court of appeals did not reach or disturb the finding that EMI's retransmissions are unauthorized public performances. It held, however, that these otherwise actionable infringements of petitioner's exclusive rights under Section 106(4) are exempt under Section 111(a)(3).

The court of appeals' decision ignores the plain language and purpose of the statutory exemption. Section 111(a)(3) on its face applies only to secondary transmitters (a) that exercise no control over the content or selection of what they retransmit *and* (b) that do not control the recipients of the retransmission *and* (c) whose activities consist solely of providing wires, cables, or other communications channels for the use of others. The legislative history makes clear that the exemption was intended to protect only passive secondary transmitters like the telephone company which market only their facilities and have no commercial interest in the programming that is carried.[1]

EMI fails all three of the statutory tests. As the court of appeals acknowledged, EMI engages in "a type of 'selection'" of the WOR-TV signal: it *chooses* that signal and no other to transmit via its satellite transponder.[2] EMI also controls who will receive the signal it retransmits. And EMI is not merely making available wires,

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[1] Section 111(a)(3) has its origins in a 1966 letter written on behalf of AT&T by Walter J. Derenberg, expressing concern over the absence from the pending copyright revision legislation of an express exemption for certain retransmission activities by the telephone company. Letter of Walter J. Derenberg to Herbert Fuchs, Counsel, Subcommittee No. 3, House Comm. on the Judiciary, dated January 27, 1966 (reproduced at Petitioner's App. 56a-64a). The Register of Copyrights has subsequently testified that the insulation of the telephone company was "the only thought that anybody had" at the time Section 111(a)(3) was adopted. *Copyright Issues: Cable Television and Performance Rights, Hearings before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 32 (1979) (statement of Barbara Ringer, Register of Copyrights).

As recently as December 21, 1982, Senator Mathias, a sponsor of the 1976 Copyright Revision Act, reiterated on the Senate floor that Section 111(a)(3) was designed to reach only "traditional 'passive' common carrier[s]" that act merely as a conduit between the sender and receiver of a signal. 128 Cong. Rec. S16,006 (daily ed. Dec. 21, 1982).

[2] Petitioner's App. 11a.

cables, and other communications channels for the use of others: it is using them itself to sell the copyrighted works contained in the signal of WOR-TV. As the district court aptly concluded, "AT&T markets its services; EMI markets a product"—the copyrighted property of petitioner and other copyright owners.[3]

The court of appeals concluded that EMI's selection of WOR-TV's signal for retransmission could be disregarded for purposes of Section 111(a)(3) because EMI has only one transponder and therefore can carry only one signal. This was plain error. All transmission facilities, including the telephone company's, are finite. The question is who decides what signal or signals will be carried. The answer is that EMI does and the telephone company does not. Congress clearly and for good reason limited the Section 111(a)(3) exemption to those who do not.

B. The Importance of the Question

The court of appeals' departure from the plain language of Section 111(a)(3) is important.

In the first place, the activities of companies like EMI are a large and growing area of economic activity. As recently as 1976, the retransmission activities of companies like EMI were geographically constrained by the cost, limited range and narrow transmission paths of terrestrial microwave facilities. With the advent of satellites dedicated to serving cable television systems, however, companies like EMI now can reach virtually every cable system (and, potentially, nearly every home) in the United States. This is a startling change. Whereas EMI once brought New York City television to a few cable systems in upstate New York, EMI now blankets the country with a broadcast signal selected and marketed on the basis of its copyrighted content. In doing so, EMI performs essentially the same distribution function as a

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[3] Petitioner's App. 30a.

broadcast or cable network or a national syndicator. But, under the court of appeals' ruling, companies like EMI, unlike conventional networks and syndicators, have no obligation to compensate copyright owners for the privilege of using and profiting from their copyrighted works.

That ruling was wrong. If money is to be made by selling the New York Mets' games to distant cable systems, the right to make it belongs in the first instance to the Mets, not to a wholly unauthorized network cable program supply service trying to peek through a statutory knothole. The right to exploit the market for intellectual property belongs to the copyright owner. *See, e.g., Goldstein v. California*, 412 U.S. 546, 555 (1973). It is no answer to say that the cable systems that receive EMI's transmissions are themselves statutorily licensed (and pay royalties): as the district court held, the retransmission *to* the cable system is a distinct infringing use of the copyrighted property, a use that is not covered by or compensated under the compulsory license and is not exempt.[4]

Nor was it appropriate for the court of appeals to depart from the language of the statute in order to balance the interests of the copyright owner against the interests of the cable television industry and render a decision that in its view would maximize the public good. As this Court has made clear, "that job is for Congress." *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401-02 (1968). The proper balance between the interest of copyright owners in controlling and exploiting their broadcast works and the interest of cable

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[4] The court of appeals reasoned that the royalties paid by cable systems under the compulsory license cover respondent's retransmissions and that treating those retransmissions as an infringement would result in a "double payment." Such reasoning puts the matter backwards: The compulsory license royalty rates paid by cable systems are set in light of the limited scope of the Section 111(a)(3) exemption.

systems and other secondary transmitters in using those works has been and continues to be a matter of intense legislative debate. Indeed, the lack of consensus on that issue was one of the primary reasons why the process of revising the Copyright Act took more than a decade. Section 111 of the 1976 Act represents a carefully considered compromise designed to accommodate these interests. The expansion of Section 111(a)(3) by the court of appeals to permit companies like EMI to select and market any television signal they wish (as long as they do not edit the content of the programming) without having to secure a license from or pay compensation to the owners of the programming upsets that balance by depriving copyright owners of their right to exploit present and future resale markets.

Moreover, although the court of appeals apparently intended to exempt only companies that retransmit signals to cable systems, its reading of Section 111(a)(3) is not so limited. The day is fast approaching when retransmission directly from a satellite to an individual's home will be commonplace. Under the court of appeals' decision, a firm retransmitting WOR-TV's signal via satellite directly to subscribers' homes could apparently claim the Section 111(a)(3) exemption despite the fact that its customers would not be subject to any licensing or royalty obligation.

The court of appeals overrode the distinction between firms that are in a position to decide that a portion of the public shall receive one signal and not another and passive carriers like the telephone company that merely provide facilities for others to use. That distinction, which is fundamental to defining rights and obligations not only under the Copyright Act but also under the Communications Act and First Amendment, could not be more plainly put than it is in Section 111(a)(3). Its willful disregard can mean no end of mischief.

CONCLUSION

For the foregoing reasons, CBS respectfully urges the Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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